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Mail Stop 1-5
Washington, DC 20219
Attn: Docket ID OCC-2007-0019
regs.comments@occ.treas.gov

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attn: OTS-2007-0022

Mr. Robert E. Feldman
Executive Secretary
Attn: Comments,
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
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comments@fdic.gov

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Attn: Docket No. R-1300
regs.comments@federalreserve.gov

Ms. Mary F. Rupp
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, Virginia 22314-3428
Comments on Notice of Proposed Rulemaking Part 717, Accuracy and Integrity
regcomments@ncua.gov

Office of the Secretary
Federal Trade Commission
Room 159-H (Annex C)
600 Pennsylvania Avenue, NW
Washington, D.C. 20580
RIN 3084-AA94
https://secure.commentworks.com/ftc-FACTAfurnishers

Re: Interagency Notice of Proposed Rulemaking: Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies under Section 312 of the Fair and Accurate Credit Transactions Act

Dear Sir or Madam:

Capital One Financial Corporation ("Capital One") is pleased to submit comments on the federal regulatory agencies' (the "Agencies") Interagency Notice of Proposed

Rulemaking (the "Proposed Rule")[1] on the accuracy and integrity of information furnished to consumer reporting agencies and reinvestigation of consumer disputes under Section 312 of the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act").

Capital One Financial Corporation is a financial holding company whose principal subsidiaries, Capital One, N.A., Capital One Bank, and Capital One Auto Finance, Inc., offer a broad spectrum of financial products and services to consumers, small businesses, and commercial clients. As of December 31, 2007, Capital One's subsidiaries collectively had $83 billion in deposits and $151.4 billion in managed loans outstanding, and operated more than 740 retail bank branches. Capital One is a major provider of credit cards, installment loans, mortgage loans and auto loans. Its subsidiaries regularly and in the ordinary course of business furnish information to the three major consumer reporting agencies ("CRAs").

Capital One commends the Agencies for the careful work they have devoted to this important rule. The proposed provisions are generally well aligned with the needs of the credit reporting function as well as with the technical capabilities of the industry's current processes.

1. Accuracy and Integrity

As a preliminary matter, Capital One notes that there are substantial practical reasons for most participants in the credit reporting system to ensure that the information they furnish is correct. First, the information that financial institutions furnish to the CRAs is the same information that the institutions themselves use to conduct business and manage their customers' accounts. Financial institutions must collect, store, and retrieve data accurately if their businesses are to operate successfully. Second, incorrect consumer report information commonly generates customer complaints, which financial institutions must deal with as a business matter regardless of regulatory requirements. For these reasons, financial institutions are aligned with CRAs and the Agencies in their interest in ensuring the accuracy and integrity of that information. Capital One believes that the Agencies' proposed concept of "accuracy," and the Agencies' proposed Guidelines Definition Approach to the concept of "integrity," are sound as matter of concept and in most details.

Capital One encourages adoption of the "Guidelines Definition Approach."

The Agencies have proposed two alternative approaches to defining the terms "accuracy" and "integrity," which they have termed the Regulatory Definition Approach ("Regulatory Approach") and Guidelines Definitions Approach ("Guidelines Approach"). As the Agencies point out, the distinction between the approaches is in the definition of "integrity." In the Regulatory Approach, the Agencies define "integrity" such that furnishers' data would lack the required integrity if it omitted "any term … the absence of which can reasonably be expected to contribute to an incorrect evaluation by a user of

[1] 72 Fed. Reg. 70944 (Dec. 13, 2007).

a consumer report of a consumer's creditworthiness."[2] In other words, under the Regulatory Approach, "integrity" is essentially synonymous with "completeness," notwithstanding that the Agencies have avoided using that term. In contrast, under the Guidelines Approach, data has "integrity" so long as it appropriately identifies the consumer to whom it applies, includes the date to which it pertains and is otherwise accurate and furnished in a form designed to minimize the likelihood that it may be erroneously displayed on a consumer report.[3]

Capital One urges adoption of the Guidelines Approach. The Guidelines definition of "integrity" correctly identifies features that information should have, even if the information is otherwise accurate, in order to be useful in credit reporting. In contrast, the Regulatory Approach would be contrary to legislative history, would alter fundamentally the voluntary nature of reporting under the FCRA, and would create an unworkable and ambiguous standard.

The Regulatory Approach ignores Congress's deliberate selection of the word "integrity" and effectively substitutes for it the word "completeness." FACT Act § 312 requires the Agencies to issue regulations regarding the *accuracy and integrity* of information furnished to the credit bureaus, not *accuracy and completeness.* The formulation "accuracy and completeness" was offered in an alternative version of Section 312 by Senators Shelby and Sarbanes[4] but was not accepted by Congress. Representative Oxley, who had moved the legislation through the House Financial Services Committee, explained: "'Accuracy and integrity' was selected [by Congress] as the relevant standard, rather than 'accuracy and completeness' as used in Sections 313 and 319, to focus on the quality of the information furnished rather than the completeness of the information furnished."[5] The Regulatory Approach is inconsistent with the legislative record, which instead supports the Guidelines Approach.[6]

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[2] Proposed Rule, §___. 41(b).

[3] Appendix E (Appendix A to FTC's Proposed Rule), Section I .B. (Guidelines Approach) 2

[4] 149 Cong. Rec. S13912 (Nov. 4, 2003).

[5] 149 Cong. Rec. E2512, E2516 (Nov. 21, 2003).

[6] The Agencies correctly note that the Congressional Record statements of House Financial Services Committee Chairman Oxley and Senate Banking Committee Ranking Minority Member Sarbanes offer conflicting interpretations of "integrity" – with Rep. Oxley's comments being consistent with the Agencies' Guidelines Appraoch and Sen. Sarbanes' comments, supporting the concept of "completeness" (though he, like the Agencies, avoided use of that word), being consistent with the Regulatory Approach – and the Agencies suggest that those legislator comments are of equal weight and hence support the Agencies' proposal of alternative definitions. 72 Fed. Reg. at 70949-50. But those statements are *not* of equal weight. Rep. Oxley had moved the legislation through the committee of which he was the chairman *in the form in which it was enacted,* and his remarks emphasize the contrast between the language that was enacted and the "completeness" language that Congress did *not* adopt. Sen. Sarbanes, on the other hand, had been a sponsor of that very "completeness" language that Congress had passed over in favor of "integrity," as explained by Chairman Oxley. Sen. Sarbanes' attempt, in his Congressional Record statement, to read into

The Regulatory Approach makes a sweeping change to the structure of the FCRA by substantially impairing the voluntary nature of furnishing. A guiding principle of the FCRA, even as amended by the FACT Act, has been that furnishing data is voluntary, with the important requirement that an entity that elects to furnish must furnish accurate information, and must include a very few specifically required pieces of information (*e.g.* notice of dispute, voluntary closure, date of first delinquency[7]). The Regulatory Approach turns that rule on its head by creating an all-or-nothing regime for data furnishers – without clearly prescribing what that "all" consists of. The result would be a substantial disincentive to reporting anything. For example, some credit grantors may have systems that are not well suited to reporting a data universe that the Agencies would regard as "complete."

Not only does the Regulatory Approach fundamentally change the current structure of the FCRA without legislative authority, it does so without introducing a workable standard in its place. To be workable, the Regulatory Approach would need to state a clear and practical standard so that furnishers and consumers could understand what data fields must be furnished. Instead, the Regulatory Approach mandates furnishing any and all data the absence of which could reasonably contribute to an incorrect evaluation by a user. Users of consumer reports are of diverse types, including financial institutions, landlords, employers, and myriad consumer services businesses, and they may evaluate consumer reports differently. Some users interpret consumer reports through complex automated models, while others employ more subjective judgmental decisioning. Even within the set of users who employ automated models, there are a number of competing models in use, each claiming to be more predictive than the others, based on proprietary methodologies that may weight different variables differently or not at all. The Regulatory Approach provides no guidance, for example, in situations in which some models use a variable that others do not – even assuming that furnishers know what those variables are. Defining the parameters of the information that must be furnished by reference to what the various users of a consumer report might think of different data elements is too ambiguous to be workable.

Definition of Accuracy

Capital One generally supports the proposed definition of accuracy. We suggest one clarification. Under the proposed definition, all information furnished must reflect "without error the terms of and liability for the account or other relationship and the consumer's performance or other conduct with respect to the account or other relationship."[8] We agree that furnishers should be held to such a standard for information

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the term "integrity" a meaning indistinguishable from his unsuccessful term "completeness" does not have the same weight as Chairman Oxley's explanation of the language that Congress actually adopted.

[7] FCRA § 623(a)(3), (4) & (5).

[8] Proposed Rule, § __.41(a).

the accuracy of which is within their control, such as account performance data. However, furnishers rely on their customers for certain identifying information that may establish "liability for the account." Sometimes applicants provide inaccurate information, such as a misspelled name or interposed numerals in an address, and furnishers should not be held strictly accountable for such errors. The Agencies should clarify the definition of accuracy so that it does not apply to information that was erroneous when provided to the furnisher by the customer and was furnished in that same state to a CRA.

Updating Information

The Agencies specifically ask whether the definition of accuracy should include an obligation to update information. We submit that the objective of updating should not be addressed through the definition of "accuracy." The current requirement under the FCRA is that a furnisher must correct and update information when the furnisher determines that the information as furnished was incomplete or inaccurate.[9] So long as the information was correct as of the date it was furnished to the CRA, it is not "inaccurate" even if it does not reflect the current state of the consumer's account. Capital One firmly believes that regular and frequent reporting enhances the reliability of the consumer reporting system, and we support a rule that encourages such practices. For example, Capital One supports inclusion in the mandatory policies and procedures of an objective to update information as necessary to reflect the current status of the customer's account. Regulators could then examine an institution's performance under that objective for its sufficiency. However, a failure to update to current status should not per se be deemed to result in an "inaccuracy."

The rule should distinguish "furnish" from "report," and respect that distinction throughout.

The Proposed Rule should distinguish more systematically between the terms "furnish" and "report." The FACT Act directs the Agencies to establish and maintain guidelines regarding accuracy and integrity for use by entities that "furnish" to consumer reporting agencies and to prescribe related regulations.[10] And the Proposed Rule generally reflects the important distinction between the act of providing information to a CRA ("furnishing"), an act which over which furnishers have control; and the display of that information by the CRA ("reporting"), an act over which furnishers have no control. That distinction is consistent with existing language in the FCRA. However, the actual language used in the Proposed Rule does not always preserve that distinction, and its failure to do so changes the substantive meaning of the rule. For example, in the Regulatory Approach, the Proposed Rule would require that a furnisher ensure that the information it furnishes "[a]ccurately *reports* the terms of those accounts" and

[9] FCRA § 623(a)(2).

[10] FCRA § 623(e)(1)(A) & (B).

"[a]ccurately *reports* the consumer's performance."[11] Likewise, in the Guidelines Approach, the Proposed Rule would require the information that is furnished to be "[*r]eported* with appropriate identifying information," "[*r]eported* in a standardized and clearly understandable form and manner," and "[*r]eported* with a date specifying the time period for which the information pertains."[12] These provisions were undoubtedly intended to address the accuracy and integrity of the information provided to consumer reporting agencies, and yet could be misconstrued to impose obligations on furnishers to ensure that information they furnish is displayed or reported accurately by the consumer reporting agencies. Thorough adherence to the statutory language would avoid such a misconstruction.

Requirement that policies and procedures be written

Capital One does not believe that the requirement that policies and procedures be written creates undue burden.

Record Retention

Capital One agrees that a furnisher's policies and procedures should provide that the furnisher maintain its own records for a reasonable period of time in order to substantiate accuracy of information subject to dispute. Capital One does not recommend that the rule identify a specific time period; instead, we encourage retaining a flexible approach under which furnishers develop policies based on their own particular information technology architecture, their own data retention standards, and their own assessment of the information required to support reasonable investigations of consumer accuracy disputes. If the Agencies do create a specific record retention period, Capital One cautions against requiring the data to be retained in its original format, which can be prohibitively expensive; retaining information in an archived system should be sufficient.

Establishing and implementing appropriate internal controls regarding accuracy and integrity.

Capital One endorses the importance of internal controls, random sampling, and regular reviews of information provided to consumer reporting agencies, and agrees that they should be a component of furnishers' policies and procedures.[13] Capital One also agrees that an important component of maintaining data integrity is that data to be provided to the consumer reporting agencies "in a form and manner designed to minimize the likelihood that the information, although accurate, may be erroneously reflected in the

[11] Appendix E, Section I.B. (Regulatory) 1(b) & (c) (emphasis added).
[12] Appendix E, Section I.B. (Guidelines) 2(i)(A), (B), & (C) (emphasis added).

[13] Appendix E, Section IV. D & M.

consumer report."[14] In furtherance of this objective, Capital One urges the agencies to confirm that furnishers have a permissible purpose to obtain a consumer report on a customer or former customer for the limited purpose of ensuring that the furnished information is reporting correctly. The most effective way to validate the accuracy of a furnisher's system is to obtain tradelines, sometimes referred to as a "bullseyes," on a sample of accounts and compare the reported tradelines with the furnisher's own system of record. Of course, to obtain this information, a furnisher must certify to the CRA that it has a permissible purpose. Unfortunately, some consumer advocates and litigants have argued that a furnisher has no permissible purpose to obtain a consumer report on a zero-balance closed account under any circumstance. Since a furnisher's accuracy obligations continue even with respect to zero-balance closed accounts, such an interpretation is an obstacle to implementing appropriate internal controls. The Agencies should take this opportunity to confirm that there is a permissible purpose to request consumer reports for the limited purpose of verifying accuracy.

2. Disputes

As we described in our comments on the Agencies' Advance Notice of Proposed Rulemaking, Capital One voluntarily investigates most direct consumer disputes, and believes that consumers should be able to dispute the accuracy of credit report information directly with the data furnisher in nearly every case in which the dispute relates to information in the report about a relationship with that furnisher. However, to the extent that the rule limits furnishers from exercising discretion over the types of disputes they must address, we provide the following comments.

Definition of direct disputes

Capital One urges a clarification to the definition of "direct dispute." An inquiry should be a "direct dispute" only if it challenges the accuracy of information furnished by the entity to whom the dispute is directed. We believe that this was the intention of the Agencies. However, neither the definition, the general rule, the exceptions, nor the provision on frivolous or irrelevant disputes makes this point explicit.[15] We suggest amending the definition as follows: "*Direct Dispute* means a dispute submitted directly to a furnisher by a consumer concerning the accuracy of any information *furnished by the furnisher* and contained in a consumer report relating the consumer."

Exceptions

Capital One agrees with the several instances identified by the Agencies in which the burdens associated with furnishers' dispute obligations outweigh likely benefits. Capital One urges the Agencies to add one additional exception and to clarify another.

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[14] Appendix E, Section I. B. 5. (Regulatory Approach), Section I. B. 2. (i) (Guidelines Approach).

[15] See Proposed Rule §§ __. 41(e), __ 43(a), (b) & (e).

In situations where a consumer disputes information that appears to be in error in one CRA's consumer report, but is reflected accurately at one or more other CRA, a furnisher should be allowed to direct the consumer to first dispute the information with the CRA that has reported the apparent error. Such a fact pattern suggests that the CRA misinterpreted or miscoded the information, rather than that incorrect information was furnished by the furnisher.

The Agencies have recognized an important exception under which furnishers need not respond to disputes submitted by or on a form prepared by a credit repair organization.[16] This is an important exception because financial institutions receive an overwhelming number of such form letters, often asserting meritless disputes. Unfortunately, it is rarely possible to determine with certainty that the source of these letters is a credit repair organization. For that reason, Capital One urges the Agencies to revise the exception so that it applies when the furnisher "reasonably believes" that the dispute was prepared by or submitted on a form prepared by a credit repair organization.

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Capital One appreciates the opportunity to comment on the Agencies' Notice of Proposed Rulemaking under FACT Act Section 312. If you have any questions about this matter and our comments, please call me at (703) 720-2255.

Sincerely,

Christopher T. Curtis
Associate General Counsel
Policy Affairs Group

[16] Proposed Rule § ___. 46(b)(2).